

Message Text

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EXDIS

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TAGS: PEPR, US, TW, CH
SUBJECT: RECOGNITION OF THE PRC-THE LEGAL IMPLICATION FOR US-TAIWAN
RELATIONS

REF: TAIPEI 1160

1. SUMMARY AND INTRODUCTION: THIS TELEGRAM TAKES ISSUE WITH THE CONVENTION WISDOM THAT UPON RECOGNITION OF THE PRC AS THE GOVERNMENT OF CHINA, ALL US TREATIES AND AGREEMENTS WITH THE REPUBLIC OF CHINA AUTOMATICALLY LAPSE. IT ARGUES INSTEAD THAT ALL REMAIN IN EFFECT UNLESS THERE IS EXECUTIVE OR LEGISLATIVE ACTION TO TERMINATE THESE AGREEMENTS. THE MESSAGE CARRIES EXDIS CONTROL IN ORDER TO GIVE THE DEPARTMENT THE OPTION OF DECIDING ON DISTRIBUTION. WE RECOMMEND, HOWEVER, THAT THE APPROACH OUTLINED HERE BE GIVEN A WIDE AIRING NOT ONLY WITH THE CONGRESS BUT OUTSIDE THE GOVERNMENT AS WELL WITH RECOGNIZED AUTHORITIES IN THE FIELD SUCH AS NICHOLAS KATZENBACK GGEXAL, ABE CHAYEN AND JERRY COHEN.

2. OF THE MOST DIFFICULT PROBLEMS THE UNITED STATES GOVERNMENT FACES IN CARRYING OUT THE POLICY OF NORMALIZATION OF RELATIONS WITH THE PRC IS HOW TO PRESERVE OUR PRACTICAL RELATIONSHIPS WITH TAIWAN. IT HAS BECOME WIDELY ACCEPTED OVER THE PAST FEW YEARS THAT THIS CAN ONLY BE DONE
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THROUGH A COMPLEX PROCESS OF SEEKING ENABLING OR AMENDING LEGISLATION FROM THE CONGRESS TO PRESERVE EXISTING AGREEMENTS AND TREATIES. THERE ARE A NUMBER OF DIFFICULTIES WITH THIS APPROACH: IN ACCEPTING THE VIEW THAT ANY RELATIONSHIP NOT EXPLICITLY CONTINUED HAS BEEN ENDED, WE RUN THE RISK OF OVERLOOKING SOMETHING, THEREBY UNWITTINGLY DAMAGING TAIWAN'S STABILITY; SOME ASPECTS OF THE US-TAIWAN RELATIONSHIP AFTER

NORMALIZATION WOULD REMAIN IN LEGAL LIMBO UNTIL THE WHOLE LEGISLATIVE PROCESS WAS COMPLETED; AND THERE WOULD SEEM A HIGH RISK THAT THE CONGRESSIONAL DEBATE AND THE LANGUAGE THE CONGRESS MIGHT ADOPT IN THIS PROCESS WOULD CREATE SUFFICIENT RESENTMENT IN PEKING AS TO JEOPARDIZE NORMALIZATION.

3. THIS PAPER ARGUES THAT NO SUCH RISKY AND COMPLEX PROCEDURES ARE REQUIRED TO PRESERVE PRACTICAL RELATIONS WITH TAIWAN. SPECIFICALLY CHALLENGED IS THE VIEW THAT ALL OUR AGREEMENTS WITH TAIWAN AUTOMATICALLY LAPSE UPON RECOGNITION OF THE PRC AS THE GOVERNMENT OF CHINA. INSTEAD IT ARGUES THE CONTRARY: THAT ALL OUR AGREEMENTS WILL REMAIN IN EFFECT UNLESS WE TAKE ACTION TO VOID OR TERMINATE THEM. THIS POSITION IS NOT ONLY CONSISTENT WITH INTERNATIONAL LAW BUT ONE WHICH WOULD BE SUSTAINED IN THE U.S. COURTS.

4. NO ONE DISPUTES THAT TREATIES AND AGREEMENTS REMAIN IN EFFECT DESPITE SEVERANCE OF DIPLOMATIC RELATIONS (ARTICLE 63 OF THE VIENNA CONVENTION ON THE LAW OF TREATIES). CONFUSION ARISES FROM THE ASSUMPTION THAT IF THE UNITED STATES DOES NOT RECOGNIZE TAIWAN AS A STATE OR THE REPUBLIC OF CHINA AS A GOVERNMENT, THEY WILL CEASE IN FACT TO BE STATE OR GOVERNMENT. SINCE INTERNATIONAL LAW PROVIDES THAT TREATIES AND AGREEMENTS COME TO AN END WHEN A STATE CEASES TO EXIST, IT IS ASSUMED THAT OUR AGREEMENTS WITH THE REPUBLIC OF CHINA AUTOMATICALLY LAPSE. THERE IS NO BASIS FOR SUCH LIMITED OFFICIAL USE

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A VIEW EITHER IN INTERNATIONAL LAW OR AMERICAN POLICY AND PRACTICE.

5. HOWEVER VAGUE INTERNATIONAL LAW CAN SOMETIMES BE, IT IS CLEAR THAT RECOGNITION AND EXISTENCE ARE SEPARATE CONCEPTS. THE UNITED STATES (SEE RESTATEMENT OF THE LAW-2D-/REVN RELATIONS LAW OF THE UNITED STATES, SEC 4) DEFINES A "STATE" WITHOUT REFERENCE TO RECOGNITION AS "AN ENTITY THAT HAS A DEFINED TERRITORY AND POPULATION UNDER THE CONTROL OF A GOVERNMENT AND THAT ENGAGES IN FOREIGN RELATIONS." IN 1933 THE UNITED STATES SIGNED THE INTER-AMERICAN CONVENTION ON THE RIGHTS AND DUTIES OF STATES IN WHICH IT WAS EXPLICITLY STATED THAT "THE POLITICAL EXISTENCE OF THE STATE IS INDEPENDENT OF RECOGNITION BY OTHER STATES." A STATE DOES NOT COME INTO EXISTENCE WHEN IT IS RECOGNIZED NOR DOES IT CEASE TO BE A STATE IF RECOGNITION IS WITHDRAWN. ONCE IT COMES INTO EXISTENCE, "IT CONTINUES UNTIL IT IS EXTINGUISHED BY ABSORPTION OR DISSOLUTION" (HACKWORTH 1 INTERNATIONAL LAW 127-1940). IF WE WERE TO WITHDRAW RECOGNITION FROM THE REPUBLIC OF CHINA, IT WOULD BECOME FOR U.S. PURPOSES NOT A NON-STATE BUT AN UNRECOGNIZED STATE.

6. DOES INTERNATIONAL LAW IMPOSE AUTOMATIC LIMITS ON THE TREATMENT WE COULD AFFORD AN UNRECOGNIZED STATE OR GOVERNMENT? CLEARLY NOT; WE CAN CHOOSE. RECOGNITION IS AN ACKNOWLEDGEMENT BY THE RECOGNIZING STATE THAT IT WILL FOR ALL PURPOSES TREAT THE RECOGNIZED STATE AS BEING ENTITLED TO THE RIGHTS AND PRIVILEGES OF THAT STATUS. BUT NONRECOGNITION DOES NOT CARRY CONVERSE INFERENCES. "STATES REFUSING OR WITHHOLDING RECOGNITION DO NOT SAY THAT NONE OF THE RIGHTS ORDINARILY ATTACHED TO THE STATUS OF STATEHOOD OR GOVERNMENT WILL BE ACCORDING TO THE CLAIMANT. THEY SAY NOTHING BUT MAY IN PRACTICE ACCORD SOME RIGHTS AND REFUSE OTHERS" (KAPLAND AND KATZENBACK, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW).

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7. OF COURSE MAKING A CASE IN INTERNATIONAL LAW COUNTS FOR NOTHING IF THE COURTS OF THE UNITED STATES WOULD NOT SUSTAIN IT. THERE IS AMPLE EVIDENCE IN JUDICIAL STATEMENTS AND OPINIONS TO SUPPORT THE POSITION THAT THE COURTS WOULD NOT INTERFERE WITH THE PRESIDENT'S AUTHORITY TO CONDUCT FOREIGN RELATIONS NOR WOULD THEY QUESTION AN EXECUTIVE BRANCH STATEMENT THAT OUR AGREEMENTS WITH TAIWAN CONTINUE UNLESS RENOUNCED OR ABROGATED. CHARLES EVANS HUGHES (23 PROCEEDINGS, AMERICAN SOCIETY OF INTERNATIONAL LAW 194-1929) COMMENTED THAT IT WAS "PERFECTLY IDLE TO CONSIDER THAT THE SUPREME COURT WOULD EVER HOLD THAT ANY TREATY MADE IN A CONSTITUTIONAL MANNER IN RELATION TO THE EXTERNAL CONCERNS OF THE NATION IS BEYOND THE POWER OF THE SOVEREIGNTY OF THE UNITED STATES OR INVALID UNDER THE CONSTITUTION OF THE UNITED STATES WHERE NO SPECIFIC PROHIBITION OF THE CONSTITUTION HAS BEEN VIOLATED." IN UNITED STATES V BELMONT, THE COURT RULED THAT THE CONDUCT OF FOREIGN RELATIONS IS

COMMITTED BY THE CONSTITUTION TO THE POLITICAL DEPARTMENTS OF THE FEDERAL GOVERNMENT AND THAT THE PROPRIETY OF THE EXERCISE OF THAT POWER IS NOT OPEN TO JUDICIAL INQUIRY. IN UNITED STATES V PINK, THE COURT RULED THAT THE PRESIDENT'S AUTHORITY TO CONDUCT FOREIGN RELATIONS "IS NOT LIMITED TO A DETERMINATION OF THE GOVERNMENT TO BE RECOGNIZED. IT INCLUDES THE POWER TO DETERMINE THE POLICY WHICH IS TO GOVERN LIMITED OFFICIAL USE

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THE QUESTION OF RECOGNITION." IN LATVIAN STATE CARGO & PASSENGER S.S. LINE V MCGRATH, THE COURT STATED THAT "THE CONDUCT OF FOREIGN AFFAIRS IS, OF COURSE, A FUNCTION OF THE EXECUTIVE BRANCH OF GOVERNMENT AND THE JUDICIAL BRANCH HAS NO PART IN IT OR CONTROL OVER IT. IT IS SETTLED BY THE UNITED STATES V BELMONT AND UNITED STATES V PINK THAT IF THERE IS A FORMAL ACT BY THE EXECUTIVE DEPARTMENT--THE COURTS MUST GIVE FULL EFFECT TO THE TERMS OF THE ACT." THE COURT WAS REFERRING TO ACTS REGARDING RECOGNITION OF A FOREIGN STATE.

8. CLEARLY THE COURTS SEE THEIR FUNCTION AS LIMITED TO DETERMINING WHETHER THE EXECUTIVE ACTION RELATED TO FOREIGN POLICY IS WITHIN THE BROAD FOREIGN POLICY AUTHORITY OF THE PRESIDENT. INDEED IT IS CUSTOMARY FOR THE COURTS TO SEEK AND FOLLOW EXECUTIVE BRANCH GUIDANCE ON CASES INVOLVING EXTERNAL RELATIONS. THEREFORE, IF THE PRESIDENT RECOGNIZED THE PRC AS THE GOVERNMENT OF CHINA BUT AT THE SAME TIME STATED THAT, IN KEEPING WITH OUR POLICY OF MAINTAINING OUR PRACTICAL RELATIONS WITH TAIWAN, ALL OUR AGREEMENTS CONCLUDED WITH TAIPEI WOULD REMAIN IN EFFECT, IT IS INCONCEIVABLE THAT THE COURTS WOULD NOT GIVE LEGAL EFFECT TO THIS POLICY. MOST PROBABLY IN THE EVENT SOMEONE TRIED TO CHALLENGE THE CONTINUED VALIDITY OF ANY OF THESE AGREEMENTS, THE COURTS WOULD SIMPLY ASK THE SECRETARY OF STATE TO CERTIFY WHETHER THEY REMAINED IN EFFECT. ON THE BASIS OF THE SECRETARY'S AFFIRMATIVE REPLY, THE COURT WOULD THROW THE CASE OUT.

9. OF MORE DETAILED GUIDANCE FROM THE SECRETARY WERE REQUESTED, THE STATE DEPARTMENT'S CERTIFICATION IN THE CASE OF SALIMOFF V STANDARD OIL C. OF N.Y. (1933) PROVIDES MODEL LANGUAGE FOR THE TAIWAN CASE. IN THE SALIMOFF CASE (WHICH RELATED TO THE SOVIET GOVERNMENT'S POWER TO CONFER TITLE TO PROPERTY WITHIN LIMITED OFFICIAL USE

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ITS BORDERS), THE COURT ASKED FOR GUIDANCE BECAUSE AT THAT TIME THE UNITED STATES HAD NOT YET EXTENDED RECOGNITION

TO THE USSR. THE CERTIFICATE STATED: A) THAT THE UNITED STATES HAD NOT RECOGNIZED ANY GOVERNMENT IN RUSSIA SINCE THE OVERTHROW OF THE PROVISIONAL GOVERNMENT; B) THAT THE STATE DEPARTMENT WAS COGNIZANT OF THE FACT THAT THE SOVIET REGIME WAS EXERCISING CONTROL AND POWER IN THE TERRITORY OF THE FORMER RUSSIAN EMPIRE AND C) THAT THE REFUSAL OF THE UNITED STATES TO RECOGNIZE THE SOVIET REGIME WAS NOT BASED ON THE GROUND THAT THE REGIME DID NOT EXERCISE AUTHORITY IN THAT TERRITORY. WHAT THE DEPARTMENT WAS SAYING, OR RATHER LEADING THE COURT TO SAY, WAS THAT WHILE WE DID NOT RECOGNIZE THE USSR, IT HAD THE ATTRIBUTES OF A STATE. THE COURT RULED THAT THE SOVIET GOVERNMENT WAS A "DE FACTO OR QUASI-GOVERNMENT RULING WITHIN ITS BORDERS."

10. IN HIS PAMPHLET "DE-RECOGNIZING TAIWAN; THE LEGAL PROBLEMS", VICTOR LI NOTES THAT DESPITE THE USE OF SUCH TERMS AS "STATE", "GOVERNMENT", "NATION" OR EVEN "FRIENDLY GOVERNMENT" IN THE VARIOUS STATUTES RELATING TO AGREEMENTS WITH FOREIGN COUNTRIES, THERE IS NO GENERAL PROHIBITION AGAINST DEALING WITH UNRECOGNIZED COUNTRIES. ON THE CONTRARY, LI ARGUES THAT IF TAIWAN HAS SUFFICIENT ATTRIBUTES TO BE CONSIDERED A "GOVERNMENT" (WHICH THE COURTS WOULD RULE IT DID) THERE IS "NOTHING IN THESE STATUTES WHICH PREVENTS THEIR BEING FULLY APPLIED TO TAIWAN". THE ONE EXCEPTION IS THE FOREIGN ASSISTANCE KT WHICH BARS AID TO COUNTRIES WITH WHICH WE HAVE SEVERED DIPLOMATIC RELATIONS. SINCE WE DO NOT CONTEMPLATE EXTENDING AID TO TAIWAN AFTER NORMALIZATION, THIS PROHIBITION NEED NOT BE REMOVED.

11. WHERE VICTOR LI SAW PROBLEMS REQUIRING LEGISLATION WAS IN THE HYPOTHETICAL SITUATION IN WHICH THE UNITED STATES NOT ONLY RECOGNIZED THE PRC AS THE GOVERNMENT OF CHINA BUT WENT BEYOND THAT TO RECOGNIZE TAIWAN AS A PART OF THE PRC. LI HAD LIMITED OFFICIAL USE

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TO CONSIDER THIS POSSIBILITY IN ORDER TO MAKE HIS ESSAY COMPLETE, BUT THIS PROBLEM IS OF NO MORE THAN ACADEMIC INTEREST SINCE U.S. POLICY HAS BEEN, AND I ASSUME WILL REMAIN, NOT TO GO BEYOND THE VARIOUS FORMULAS (SHANGHAI COMMUNIQUE, UK, CANADIAN AND EVEN JAPANESE) ON THE STATUS OF TAIWAN, ALL OF WHICH DELIBERATELY AND CAREFULLY FALL SHORT OF RECOGNIZING TAIWAN AS PART OF THE PRC.

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12. IMPORTANT AS IT IS TO HAVE A LEGAL BASIS FOR OUR CONTINUING RELATIONSHIP WITH TAIWAN, IN THE FINAL ANALYSIS THIS IS A POLITICAL AND PRACTICAL QUESTION. WHAT WE WANT IS A METHOD WHICH THE CONGRESS WILL ACCEPT, WHICH WILL HAVE THE LEAST DESTABILIZING EFFECT ON TAIWAN AND WHICH WILL DO THE MINIMUM DAMAGE TO OUR RELATIONS WITH THE PRC. CONGRESS WOULD PROBABLY PREFER THE APPROACH SUGGESTED HERE BECAUSE OF ITS SIMPLICITY. THERE IS NO IMPLICATION OF AN ASSERTION OF EXECUTIVE POWER AT THE EXPENSE OF THE CONGRESS BUT SIMPLY OF THE PRINCIPLE THAT CONGRESSIONAL AND EXECUTIVE ACTION IS REQUIRED ONLY TO TERMINATE AGREEMENTS AND IN THE ABSENCE OF SUCH ACTION THE AGREEMENTS CONTINUE IN EFFECT. THE PRESIDENT WOULD SAY THIS AT THE TIME HE RECOGNIZED THE PRC, AND THE CONGRESS COULD EITHER DO NOTHING OR PASS A RESOLUTION SUPPORTING THE PRESIDENT'S STATEMENT. THE EFFECT ON TAIWAN WOULD BE FAVORABLE SINCE THE ISLAND WOULD NOT REMAIN IN A LEGAL LIMBO WAITING FOR CONGRESS TO COMPLETE THE PROCESS OF AMENDING EXISTING LEGISLATION TO ALLOW THE AGREEMENTS TO CONTINUE. THE PRC WOULD BE UNHAPPY BUT PROBABLY LESS SO THAN IF A WHOLE SERIES OF LAWS WERE AMENDED TO DEFINE TAIWAN AS A STATE. THE PROPOSAL OUTLINED IN THIS PAPER DOES NOT REQUIRE EITHER THE EXECUTIVE OR THE LEGISLATURE TO CALL TAIWAN A STATE OR AN INDEPENDENT GOVERNMENT; THE PRESIDENT NEED ONLY STATE HIS POLICY: THAT HE WANTS TO MAINTAIN OUR LIMITED OFFICIAL USE

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AGREEMENTS AND PRACTICAL RELATIONS WITH TAIWAN, AND THE COURTS WILL GIVE THAT POLICY EFFECT IF NECESSARY BY DEFINING TAIWAN, FOR LEGAL PURPOSES, AS A STATE.

13. IMPLICIT IN THIS ARGUMENT, OF COURSE, IS THAT THE SECURITY TREATY ALSO DOES NOT AUTOMATICALLY LAPSE. INCONSISTENT AS

IT MAY BE WITH RECOGNITION OF PEKING, IT REMAINS IN EFFECT
UNLESS RENOUNCED OR ABROGATED IN ACCORDANCE WITH ITS TERMS
(I.E. ONE YEAR'S NOTICE). HOW THE PRESIDENT WOULD WANT TO
HANDLE THAT IS MORE A QUESTION OF CONGRESSIONAL RELATIONS
THAN OF LAW. ONE APPROACH WOULD BE TO SERVE NOTICE OF
ABROGATION AND NOTIFY THE CONGRESS. THIS WOULD
SATISFY THE MODERATES (E.G. SENATOR JAVITS) WHO DO NOT
OBJECT TO ENDING THE TREATY AS LONG AS IT IS DONE BY
ABROGATION AND NOT BY ASSERTING AN AUTOMATIC TERMINATION.
THE EXECUTIVE BRANCH COULD CONCEDE THAT THE QUESTION OF
WHETHER THE EXECUTIVE CAN TERMINATED A TREATY INDEPENDENTLY OF
THE CONGRESS OR SENATE HAS NEVER BEEN RESOLVED AND LEAVE
IT TO THE CONGRESS TO DECIDE HOW AND WHETHER TO ADDRESS
IT. PROBABLY THE LEAST CONTENTIOUS APPROACH WOULD BE FOR
THE PRESIDENT TO COMBINE HIS NOTIFICATION TO THE CONGRESS
OF HIS INTENT TO ABROGATE OUR BILATERAL US-ROC SECURITY
TREATY WITH A REQUEST THAT THE CONGRESS SUPPORT A PRESIDENTIAL
STATEMENT REAFFIRMING OUR UNILATERAL COMMITMENT TO A PEACEFUL
SOLUTION TO THE TAIWAN PROBLEM.

14. WE NEED NOT CONCEDE THAT ANY OF OUR OTHER TREATIES
AND AGREEMENTS WITH TAIWAN ARE INCONSISTENT WITH RECOGNITION OF
THE PRC SINCE ALL OF THOSE AGREEMENTS WHICH REMAIN OPERA-
TIONAL RELATE TO PRACTICAL RELATIONSHIPS AND APPLY,
EITHER IN THEIR ORIGINAL LANGUAGE OR BY SUBSEQUENT AMENDMENT,
ONLY TO AREAS UNDER THE JURISDICTION OF THE AUTHORITIES ON
TAIWAN (I.E. TAIWAN AND THE PESCADORES).
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